HEIRS OF HOWARD ISAAC

IBLA 75-310 Decided April 28, 1982

Petition for reconsideration of Board order dismissing appeal of a decision of the Alaska State Office, Bureau of Land Management, which rejected Alaska Native allotment application F-13041.

Petition granted; prior Board order vacated, and decision of BLM affirmed.

1. Alaska: Native Allotments

An Alaska Native allotment application is not approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), if the land is included in a State selection application but is not within a core township of a Native village. Under subsection (a)(4) of that section, such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, 43 U.S.C. § 270-1 through 270-3 (1970) (repealed 1971).

2. Alaska: Native Allotments--Hearings--Rules of Practice: Hearings

No rights inure to the estate of a deceased Native allotment applicant where the application does not show prima facie entitlement because the land was segregated by a State selection at the asserted time when use and occupancy commenced. A request for a hearing on appeal is properly denied in the absence of any evidence or allegation of use and occupancy predating the State selection.

APPEARANCES: Frederick Torrisi, Esq., Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The heirs of Howard Isaac have petitioned for reconsideration of our order dated June 26, 1975, docket No. IBLA 75-310, wherein we dismissed Isaac's appeal of a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 27, 1974. The BLM decision rejected Isaac's Native allotment application, F-13041, filed pursuant to the Alaskan Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976), because on its face it stated that the applicant had not initiated qualifying use and occupancy of the parcels applied for until 1962. The decision recites that when the State of Alaska filed State selection applications F-027599 and F-027785 on April 24, 1961, and May 25, 1961, respectively, the lands were thereby segregated from all appropriations based upon application or settlement and location.

Shortly after issuance of our order, the court in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), held that a hearing was required where the Department proposed to reject a Native allotment application based on a determination that applicant's use and occupancy of the land was insufficient to qualify for an allotment. Appellant's heirs have petitioned for reconsideration based upon the decision in the aforementioned case. Appellant's petition alleges a Native allotment application should not be rejected without opportunity for a hearing where an applicant, without the assistance of counsel or knowledge of the significance of his statement, asserts that use and occupancy of the allotment began in 1962 as opposed to 1961. No allegation of use and occupancy prior to the State selection has been made.

While this petition was pending, Congress enacted the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (1980), which affects pending Alaska Native allotment applications. It is therefore appropriate that we initially determine how this statute affects the adjudication of this case.

[1] Section 905(a)(1) of that statute approved all Native allotment applications pending before the Department on or before December 18, 1971, which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve in Alaska subject to valid existing rights, except where otherwise provided by other subsections of that section. Subsection 905(a)(4) concerns the adjudication of Native allotment applications which conflict with State selection applications. That subsection provides in pertinent part:

> [W]here an allotment application describes land * * * which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to the Alaska Statehood Act and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act from those lands made available for selection by section 11(a)(2) of the Act by any Native Village certified as eligible pursuant to section 11(b) of such Act [i.e., a "core" township selection by an eligible Native village], paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application

shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act, and other applicable law.

Although one of the two parcels for which appellant applied is within a village selection, it does not appear that it is within the core township of a Native village. Because State selection applications have been filed for the lands, the allotment must be adjudicated pursuant to the provisions of the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). Daniel Johansen (On Reconsideration), 54 IBLA 295 (1981); Roselyn Isaac (On Reconsideration), 53 IBLA 306 (1981).

An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a State selection application was filed for the land. Daniel Johansen (On Reconsideration), supra; Roselyn Isaac (On Reconsideration), supra; Andrew Petla, 43 IBLA 186 (1979). But where the Native allotment applicant alleges use and occupancy prior to the filing of a State selection application, it is improper to reject his application without affording him notice and opportunity for a hearing, through initiation of contest proceedings against the application. Daniel Johansen (On Reconsideration), supra; see Pence v. Kleppe, supra; Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978); Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976).

[2] Counsel for appellant contends that a hearing is required even in the absence of an allegation of use and occupancy prior to the State selection. An Alaska Native's right of selection under the allotment Act is non-alienable and is not subject to inheritance. However, where an allotment selection has been made and the applicant has fully complied with the law and the regulations and has accomplished all that is required to be done during his lifetime, the equitable right to an allotment becomes a property right which is inheritable. Thomas S. Thorson, Jr., 17 IBLA 326, 327 (1974). The application in this case, like that in Thorson, was incomplete and required amendment to make it allowable under the law. This Board held in Thomas S. Thorson, Jr., supra, that no rights inure to the estate of a deceased Native allotment applicant where the application which he filed does not show prima facie entitlement and where a basic amendment of the application would be required to conform to the law and the regulations. It may be questioned whether the latter holding in Thorson is still good law in light of the subsequent Pence litigation, the Board's decisions in Peters, and the holding of the Board in Daniel Johansen (On Reconsideration), supra, that a hearing is required where evidence is tendered on appeal to show that the application was in error and that applicant's use and occupancy actually predated the State selection. However, no hearing will be ordered where there is no allegation of use and occupancy prior to the time the land was segregated. See Pence v. Andrus, supra at 743; John Moore, 40 IBLA 321, 86 I.D. 279 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for

reconsideration is granted; our prior order is vacated, and the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

James L. Burski
Administrative Judge